# THE LIMITS OF SOVEREIGNTY.

AMONG the theories of jurists, there is, perhaps, none which has been a battle-ground for so long a time, as that which relates to the limits of sovereign power. For two centuries and a half the writers who maintained that sovereignty is in its nature unlimited, and those who contended that man is endowed with certain natural rights which the State cannot legally invade, waged against each other a continual war; the former, in England, being found among the partisans of monarchy, the latter, in the ranks of those who favored the popular cause. But now, just at the moment when democracy is carrying everything before it, and the advocates of the natural rights of man appear to have triumphed, there has come a sudden change of principle, and the victors, adopting the opinions of the vanquished, are almost universally convinced that the authority of the sovereign, from its very nature, can be subject to no limitation or restraint.

This change of theory is far from accidental, and may be traced to two entirely distinct causes, of which one has acted with great force upon the mass of the community, while the other has produced an effect even more striking upon the minds of scholars. So long as the reins of government were in the hands of a king, it was natural that the advocates of popular rights should seek to restrain his power, but after the people had obtained control of the State, it was not to be expected that they would show the same respect for principles which fettered the exercise of their own authority. The ascendency of the popular party had, therefore, an inevitable tendency to upset those doctrines which were designed to limit the exercise of power by others. Now, it was during the period when democracy was beginning to prevail, that Bentham's treatise on legislation,[1] and Austin's work on jurisprudence, attracted the serious attention of scholars; the first of these writers proclaiming the greatest happiness of the greatest number

[1] Bentham, as will be seen in the following pages, far from teaching the doctrine that the power of the sovereign is unlimited, distinctly repudiated it, and yet there can be no doubt that his principles, by undermining the old notion of natural rights, materially helped to establish that doctrine.

as the sole and final test of legislation, while the second developed, in a new form, the doctrine that sovereignty is essentially incapable of limitation, and by the clearness and force of his logic, obtained a mastery over the legal thought of English-speaking people, which has never been equalled in the history of the race. No doubt the increasing strength of democracy has helped to make Austin's views upon sovereignty prevail; but this alone would not account for the power with which his theories have stamped themselves upon all subsequent legal speculation, and, in fact, the many criticisms upon this work, however correct some of them may have been, have served to bring into brighter light the ascendency of his mind.

At first sight Austin's doctrine appears to involve merely an abstract question, or intellectual problem, which has no real bearing on actual government; but this is by no means true, for, although as understood by its author it is harmless, even if erroneous, yet, when applied to politics, it is liable to be very much abused, and to become the source of evils which were by no means contemplated by him. In the first place, the doctrine that sovereign power is unlimited leads almost unavoidably to the opinion that it is proper to use that power without restraint, because the great mass of the people will not distinguish between the legal and moral aspect of politics, and are very sure to conclude that if the State has a legal right to deprive the individual of his property, it is under no moral obligation to refrain from doing so. The people are apt, in the second place, to confound sovereignty with political power, and to attribute the former to any body which exercises legislative authority. If, therefore, they are taught that the sovereign has absolute power, they will believe that the legislature ought to, and in fact does, have authority to pass laws without restraint; a notion which would undermine the very foundations of our whole political system. It is for these reasons that the doctrine advanced by Austin is of real practical importance, and not a mere matter for intellectual speculation. In considering the subject, however, I shall assume the liberty, so rarely allowed at the present day, of treating the theory from a purely abstract stand-point, without inquiring in what body or bodies sovereignty is actually lodged in the United States, or whether those bodies (be they States severally, States in union, or people of the nation) are, in fact, possessed of absolute power or not.

The writers of that great school which maintained the possibility of limitations upon the authority of government, based their theories upon what they styled the natural rights of man. Man, they said, is endowed by nature with certain legal rights which he cannot or at least which he never did surrender, and these rights, derived as they are from a higher source than civil government, cannot be abridged or destroyed by legislation. Such a tenet of man's natural rights was for a long time accepted as an axiom by the great bulk of Englishmen, and it is due to Austin more than to any one else, with the possible exception of Bentham, that within the last half century the idea has been completely discredited, and has been abandoned by almost every scholar in England and America. Austin's teachings on this subject were not, however, altogether original with him, but were derived from Hobbes, whose writings, except when occasionally mentioned with a shudder, slept unnoticed for two hundred years until brought into prominence again by his great disciple. Hobbes seems to have been the first man who understood the difference between legal and moral obligations; who saw that legal rights depend for their existence upon positive law, and that positive law is an artificial creation made by men. In this view he was followed by Austin, who developed the crude notions of his master into a complete philosophical system.

Austin's definition of law may be briefly stated as follows: A law is a command, coupled with a sanction, given by a political superior or sovereign to a political inferior or subject. Now, so far as statute law is concerned this definition is undoubtedly correct, for a statute is clearly a command issued by the legislature, but the customary law presents at once a difficulty, and of this Austin says (Lecture I., p. 23, 2d ed.): —

"Now, when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the State: an authority which the State may confer expressly, but which it commonly imparts by way of acquiescence. For, since the State may reverse the rules which he makes, and yet permits him to enforce them by the power of the political com-

munity, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

. . . . . .

"Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit."

"Now, when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The State which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'"

The reasoning here presented rests, it will be noticed, entirely on the statement that the sovereign legislature has power to abolish the customary law; but this assertion, while very nearly accurate in the present state of political development, is by no means universally true. In most of the civilized countries of the world, perhaps in all of them, there exists to-day a legislative body which possesses such a power; but this has not always been the case, for it is well known to students of early forms of law that the legislative function develops much later than the administrative or the judicial, and that law attains a considerable degree of perfection before a distinct idea of legislation makes its appearance. The practice, indeed, of creating law shows itself at first modestly and timidly, and attempting to conceal its real nature, assumes the form of declaring existing rules or regulating the methods of procedure and not that of deliberate innovation. For a long time custom is far more potent as a source of law than legislation, and it is only by very slow degrees that the latter acquires the predominance. A certain class of laws, moreover, those which relate to the fundamental institutions of government, were not drawn completely within the sphere of legislation until very recent times. Louis XIV., for example, was the sole possessor of political power, and, therefore, absolute sovereign in France; but an attempt on his part to make Madame de Maintenon his successor on the throne would undoubtedly not have been considered by the bulk of his subjects as impairing his heir's right to the crown; and although in some countries the royal succession was deliberately altered, yet the power of changing the

constitution of government cannot be said to have developed fully in modern Europe before the outbreak of the French revolution. In the early stages of civilization the power of any man or body of men to interfere with customary law is extremely limited, and the persons by whom justice is administered are not in fact, or in public estimation, the ministers of any legislative body, nor are they under its control. It is only by the purest of fictions, therefore, that customary law under these circumstances can be said to exist by virtue of the will of such a body, or to be established by its commands.

It is clear, therefore, that Austin's definition of law, although nearly accurate at the present day, is incorrect when applied to primitive societies, or even to those which have reached a considerable degree of civilization. The definition, in short, is not true of law in general, and this is important when we come to consider the nature of sovereignty, because Austin's proof that sovereign power can have no limits is based entirely, as we shall see, upon the proposition that all law is the command of a political superior. If, therefore, this proposition is not universally true, his proof, even if otherwise unimpeachable, will apply only to those States in which it can be shown as a fact that all law derives its force from such a command; and in these States, moreover, it will not demonstrate that the power of the sovereign is incapable of limitation, but merely that it is not actually limited at the time when the fact in question is found to exist.

We now come to the great argument designed to prove that sovereign power cannot be limited. It is as follows (Lect. VI., p. 225, 2d ed.): —

"Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set, directly or circuitously, by a monarch or sovereign number to a person or persons in a state of subjection to its author."

"Now, it follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. A monarch or sovereign number, bound by a legal duty, were subject to a higher or

superior sovereign: that is to say, a monarch or sovereign number, bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law is a flat contradiction in terms."

"Nor would a political society escape from legal despotism, although the power of the sovereign were bounded by legal restraints. The power of the superior sovereign immediately imposing the restraints, or the power of some other sovereign superior to that superior, would still be absolutely free from the fetters of positive law. For, unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community, which is impossible and absurd."

This argument depends for its force, as I have said, upon the proposition that all law is the command of a definite political superior, since it is based upon the assumption that legal restraints can be imposed only by means of such a command. Now, let us return for a moment to the passage already quoted from Austin, in which he tries to prove that customary law derives its authority from a command of the sovereign. The argument there used is, shortly, as follows: The sovereign has power to abolish the customary law; by refraining from so doing he declares his pleasure that it shall continue in force; it owes its existence, therefore, to an expression of his will, and may properly be said to result from his command. The whole of this reasoning rests upon the premise that the sovereign has power to abolish the customary law, and the truth of that premise might be demonstrated by either one of two methods. It might, in the first place, be proved inductively; that is, by examining all known systems of law, and showing that in each of them the sovereign had the power claimed for him,— a result which would establish a probability more or less strong that the power in question was universal. Such an examination, however, not only fails to establish the premise in this case, but actually disproves it, because, as has been already pointed out, there are known systems of law in which the sovereign does not possess the power in question. The premise might, on the other hand, be proved deductively, that is, by showing that it followed as a logical conclusion from some other premise or proposition admitted to be sound. Now, the proposition that the power of the sovereign can have no limits

will appear on a little reflection to be the only one available for this purpose, and, inasmuch as Austin makes no attempt to examine all known systems of law, it would seem at first sight that the process of thought in his mind involved a deductive reasoning from that proposition as a premise. If, however, we state the proof that customary law is the command of the sovereign in this form, and compare it with the proof that sovereign power can have no limit, we shall see at once a flaw in the logic. These arguments, taken together, are as follows: The power of the sovereign can have no limits; he has, therefore, power to abolish the customary law; hence, all law is the command of the sovereign; and from this it follows that his power can have no limits. The reasoning in a circle here is only too evident, and it is impossible that a man of Austin's logical acuteness should have been guilty of so palpable an error. The fact is that Austin simply assumed the power of the sovereign to abolish customary law. He did not attempt to prove it deductively, nor did he make an examination of all known systems of law, but his attention having been directed only to highly developed societies, he thought the proposition sufficiently obvious to be accepted without question. It is probable, however, that many of his readers have been misled into supposing the proposition established deductively, and that they have unconsciously gone through in their own minds the reasoning in a circle already described; a mistake which is the more natural because the two arguments are separated in Austin's book by two hundred pages, and one of them might easily be forgotten before the other was reached.

I have so far attacked Austin's demonstration that the power of the sovereign can have no limit by trying to prove his premise that law is a command untrue as a general proposition, and by showing that the process by which that premise is often supposed to be established involves a reasoning in a circle. But these do not exhaust all the possible objections to his position, and for the purpose of discussing his arguments further I shall leave out of sight the criticisms already made, and suppose the proposition that all law is the command of a definite political superior to have been satisfactorily proved. From this it follows that no law can exist except by virtue of such a command; but is it therefore true that every command of a political superior, or of the ultimate superior termed the sovereign, is a law? That is, of course, the point which Austin

seeks to prove; because if there are, or may be, commands of this sort which are not laws, if, in other words, the sovereign is for any reason unable, by issuing a command, to make a law in accordance with his will, then his legislative power is limited by just the extent of that inability. Starting with the proposition which, for the purpose of this part of the discussion, I have admitted, Austin very properly draws the conclusion that a sovereign, being by definition subject to no political superior, cannot be bound by any commands issued by such a superior, and cannot, therefore, be bound by any laws, or be subject to any legal restraints whatever. From this it is clear that no act of the sovereign can be a violation of any legal duty, or give rise to any legal claim against him, or render him liable to punishment, and, in short, that he can do no legal wrong. It is also clear that no law can declare his commands invalid, or deprive them of any legal force they would otherwise possess; but it does not follow that all his acts are valid and effectual, or that all his commands are laws. These are two very different things, and the former by no means implies the latter, but may very well exist without it. The Queen of England, for example, although not a sovereign in the sense in which we are using the word, is in fact free from legal restraint. She can do no legal wrong. She cannot be sued or prosecuted for any act which she may commit. But her commands are not laws, and this is not because her power of legislation is restrained by the orders of a political superior, but simply because she possesses no legislative power at all. Here, then, we have the case of a member of a political society enjoying absolute freedom from legal restraint, without any corresponding authority to make laws.

Let us take another illustration. It was at one time asserted by the English judges that parliament had not unlimited power; that it could not, for example, make a man a judge in his own case. Now, suppose that this doctrine had prevailed, and that both the judges and the community at large had been universally in the habit of disregarding statutes which conflicted with the principle I have mentioned. It is evident that parliament in such a case would possess only a limited power of legislation, and yet would be bound by no legal duties, and subject to no legal restraints. The act of the parliament in passing a statute of this kind would not involve that body or its members in any liability to punishment, and, according to Austin's own definition, its act would not be a breach

of any duty imposed by law, because no sanction is attached in case of disobedience. The conduct of the legislature, in other words, would not be illegal, but simply ineffectual. Parliament, therefore, would be subject to no legal duty, and yet would possess only a limited authority. Austin's argument, however, goes, as I have said, farther than this, and means that if parliament were subject to no superior, the validity of its commands could not in any way be limited by law. Now, the result we have imagined could, of course, be produced by means of a law, set by a political superior, which declared the objectionable statutes invalid; but Austin makes no attempt to prove that it could not also be brought about without the intervention of such a law, and, in the case supposed, it would be clear that neither the judges, nor any definite political superior, issued commands to this effect, and that the statutes were not disregarded, on the ground that they conflicted with any such commands. To assume, indeed, that because the legislative power of the sovereign is not limited by law, it is therefore without limit, is to assume one of the very points to be proved, and a point, moreover, which is far from self-evident. It is like assuming that, because the soil of Great Britain is not bounded by that of any other country, it is unlimited in extent.

It will perhaps occur to some one that if all law is the voluntary command of the sovereign and the expression of his will (a proposition which for the purpose of this part of the discussion I have admitted), then through a change of that will any part of the law may cease to operate, and any right, being but the creature of law, may be taken away. It may seem, in short, that the sovereign, merely by revoking his own commands, can bring about any conceivable variation in that vast network of rights and duties which forms the substance of the law. Such, however, is not the case, because, although it is true that a volition which can be exercised only in one way is no volition at all, and that law cannot be said to exist by the will of the sovereign if he has no real option in the matter, yet it is equally true that the power of willing need not be unlimited in order that an act may be voluntary. It is enough that there exists a choice, although that choice does not extend to an infinite variety of objects. In order, therefore, that the act of the sovereign in making a law should be voluntary, it is only essential that he should have the option of making the law or not, or that he should have a choice between two or more possible

laws. It is not necessary that he should be able to establish any conceivable combination of rights and duties. To maintain the contrary would be like asserting that my motions are not voluntary because I cannot bend my joints the wrong way, or that my house does not stand during my pleasure, because I cannot tear down the lower story and leave the upper ones undisturbed. Hence it is clear that even if all law is based upon the will of the sovereign there may be combinations of rules which he cannot make, and it follows that there may be rights which he cannot take away; at least if we leave out of account his power to revoke all his commands at once, and introduce a general state of anarchy, — an act which would be very nearly equivalent to an abdication.

Up to this point we have been examining Austin's proof that the power of the sovereign can have no limit, and I have tried to show that the argument is based upon an erroneous premise, and that even if the premise were sound the conclusion would not follow. Let us now study his definition of a sovereign, and see what inferences can be drawn from it. "If a *determinate* human superior," he says (Lect. VI., p. 170, 2d ed.), "*not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." Now, suppose that the members of a society are in the habit of obeying all those commands issued by the sovereign which relate to a certain class of matters, but are at the same time in the habit of disobeying all his commands affecting another class of matters. Suppose, for example, that they are in the habit of obeying all commands relating to secular concerns, while in the habit of disregarding entirely all commands touching religion. In such a case it is absurd to say that there is no government, and that the condition of the society is one of mere anarchy; but it is also impossible to hold that the legislative power of the sovereign is unlimited, because those of his commands which are disregarded by his subjects, and which he has no power to enforce, amount only to ineffectual expressions of desire on his part, and by a misuse of terms alone can be called laws. Sovereignty depends, in fact, upon the habitual obedience of the society, and it is hard to see how it can extend farther than the habit upon which it rests. If, therefore, the society is not in the habit of obeying commands which relate to certain matters,

the sovereignty of the person who issues them does not cover those matters, and the commands in question are not laws. The case we have supposed is extremely unlikely to occur, because a sovereign who found that a certain class of his commands were habitually disobeyed would, in all probability, either desist from issuing them, or attempt to enforce them, and thereby provoke a conflict likely to result in his success or his overthrow. Let us, however, take a less improbable case. Let us suppose that the commands of a sovereign which concern one class of affairs are habitually obeyed, but that he refrains from issuing any commands touching another class of affairs because he knows that they would certainly be disobeyed. This case is evidently parallel to the last one, for, so long as the habit of obedience does not extend to commands dealing with certain matters, it can make no difference whether such commands are issued and disobeyed, or whether they are not issued for fear of disobedience. It would seem, therefore, that the limit of sovereign power depends upon the limit of habitual obedience; that every command of a political superior, or (if we reject the proposition that all laws are commands) every rule of conduct, which is obeyed by the bulk of a given society, is a law, provided, of course, it is coupled with a sanction appropriate to law in the state of civilization which that society has reached; and that, conversely, no command or rule of conduct is a law if it does not receive the obedience of the bulk of the society.[1]

This test can readily be applied to existing enactments, but it is not always easy to prophesy whether a command of a new and unprecedented character would be obeyed or not. Inasmuch, however, as the bulk of every society, except in cases of severe social convulsion, is, from one motive or another, in the habit of obeying what it regards as the law, and is not in the habit of obeying rules which it does not consider law unless they are agreeable, it is sufficiently accurate to say that if the bulk of a society consider that a certain command, if issued by the sovereign, would not be a law, and if they are not disposed to obey it, then such a command would not be a law, and does not lie within the legislative power of the sovereign. The extent, in other words, of sov-

[1] It may be supposed that, according to this principle, the statutes forbidding the use of liquor in some States are not laws, but that would be going too far, because these acts are by no means disregarded. Persons violating them may perhaps be rarely prosecuted, but the law is strictly enforced by the courts whenever a case is brought before them.

ereign power is measured by the habit, the opinion, and the disposition of the bulk of the society.

Bentham appears to have held this view of the limitation of sovereignty, although, from some expressions which come after the passage here quoted, it is doubtful whether he distinguished clearly the position of the sovereign from that of a subordinate legislative body. The following extract is from the *Fragment on Government*, Chapter IV.: —

"XXXIV. Let us now go back a little. In denying the existence of any assignable bounds to the supreme power, I added 'unless where limited by express convention:' for this exception I could not but subjoin. One author (*Blackstone*), indeed, in that passage in which, short as it is, he is most explicit, leaves, as we may observe, no room for it. 'However they began,' says he (speaking of the several forms of government) — 'however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute. . . .' To say this, however, of *all* governments without exception; — to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands unlimited so much as by convention; — to say, in short, that not even by convention can any limitation be made to the power of that body in a State which in other respects is supreme, would be saying, I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons; nor was of old in the Achæan league."

"XXXV. In this mode of limitation I see not what there is that need surprise us. By what is it that any degree of *power* (meaning *political power*) is established? It is neither more nor less, as we have already had occasion to observe, than a habit of, and disposition to obedience: *habit*, speaking with respect to past acts; *disposition*, with respect to *future*. This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts, as present with regard to another. For a body, then, which is in other repects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other."

"XXXVI. By means of a convention, then, we are furnished

with that common signal which, in other cases, we despaired of finding. A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect: whether to the effect of commanding the act, of permitting it, or of forbidding it. A law is issued to that effect notwithstanding. The issuing, then, of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all: in the issuing, then, of such a law, we have a fact which is *capable* of being taken for that common signal we have been speaking of. These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no more prepared to obey the governing body of his own state than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited, — what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient, — alike conducive to the happiness of the people, is another question."

It is worth while to notice here a difficulty which Austin encounters when he tries to explain the position of a person who is, at the same time, sovereign in one independent political society and subject in another. "Supposing, for example," he says (Lect. VI., p. 216, 2d ed.), "that our own king were monarch and autocrator in Hanover, how would his subjection to the sovereign body of king, lords, and commons, consist with his sovereignty in his German kingdom? A limb or member of a sovereign body would seem to be shorn, by its habitual obedience to the body, of the habitual independence which must needs belong to it as sovereign in a foreign community. To explain the difficulty, we must assume that the characters of sovereign, and member of the sovereign body, are practically distinct: that, as monarch (for instance) of the foreign community, a member of the sovereign body neither habitually obeys it, nor is habitually obeyed by it." Now, a sovereign possessed of strictly unlimited power can issue to his subject any commands he may please, and inflict punish-

ment in case of disobedience. The sovereign of England, for example, may command his subject, the sovereign of Hanover, under pain of death, to collect taxes in his German dominions, and remit them to England. In his attempt to avoid this conclusion Austin concedes the very point at issue, and seems virtually to adopt the theory of sovereignty which has been suggested in the preceding pages; for, by distinguishing between the acts which the king of Hanover performs as subject of England, and those which he performs as sovereign of a foreign country, and saying that the legislative power of England covers only the former, he admits that the British sovereign may have power to issue commands which relate to one class of acts, and at the same time may not have power to issue commands which relate to another. This is nothing less than an admission that the power of the sovereign is not always unlimited. He declares, moreover, that the question whether the legislative power of England extends to the acts of its subject performed as sovereign of Hanover is determined by the habitual obedience of the subject in that capacity. He considers, therefore, that, in this case at least, the extent of the sovereign's power is measured by the habitual obedience of the subject. The same or a similar difficulty is involved in Austin's statement (Lect. VI., p. 323, 2d ed.), that a person may be at the same time completely a member of one independent political society, and for certain limited purposes a member of another; but he makes no attempt to solve it.

If the extent of sovereign power is measured by the disposition to obedience on the part of the bulk of the society, it may be said that the power of no sovereign can be strictly unlimited, because commands can be imagined which no society would be disposed to obey. This may very well be true, and perhaps it would be proper to classify sovereigns, not according as their authority is absolute or not, but according as it is indefinite, or restrained within bounds more or less definitely fixed. Unless, indeed, the limits of power are tolerably well determined they tend to stretch farther and farther. Now, definite limits may be set to sovereign power in either one of two ways. They may result from the rivalry of two independent rulers, which settle by negotiation questions concerning the boundaries of their respective jurisdictions, and quarrel when they cannot agree; or they may be established by some formal declaration, which by sufficient precision enables the bulk of the society to have a general opinion about the extent of leg-

islative authority, and to distinguish between those commands which fall within the boundaries prescribed and those which do not.

Let us consider the first of these cases. If the sovereign's power to make laws can be limited to a certain class of affairs, it is clear that other matters not within these limits may form the sphere of action of another sovereign, and thus two sovereigns may issue commands to the same subjects, each being supreme in his own department. It may not, perhaps, be always easy in such cases to define accurately the boundaries of each ruler's authority; but this difficulty, which arises from the impossibility of an exact classification of all human actions, is constantly met with in applying the law, and does not affect the proposition that two sovereigns with different spheres of activity may govern the same subjects. The relation of the Church to the various temporal rulers in Europe during the Middle Ages was, indeed, of the character here described.

The possibility of what I may call a dual sovereignty in one political society suggests an inquiry into the connection between the terms "sovereign" and "nation." The former is the name given to an independent political superior, considered in relation to his subjects. The latter is applied to the society composed of the superior and the subjects, considered in relation to other independent political societies. Now, it is often assumed that these two conceptions are inseparable; that every nation must have one and only one sovereign, and that every sovereign, together with his subjects, must constitute a nation; but I think that this is a mistake, because, if, as I have urged, there can exist within the same territory two sovereigns, issuing commands to the same subjects touching different matters, it may very well happen that one of them has no relations with other independent political societies. It may happen, for example, that the authority of a sovereign, in respect to the matters within his competence, extends over several communities, each of which is subject in other matters to an independent political superior of its own, while all the relations with foreign powers fall within the competence of the central government, and in this case the lesser political bodies, although strictly sovereign, could not properly be called nations. I do not assert that this is true of the United States, but merely that there is nothing illogical or impossible in such a state of things. The proposition in fact, that a nation can have only one sovereign, and

that every sovereign together with his subjects must constitute a nation, depends upon the hypothesis that the authority of a sovereign is necessarily unlimited, and with that hypothesis it must stand or fall.

The second method in which the limits of sovereign power may be definitely fixed is, by means of a declaration, sufficiently precise to enable the members of the society to distinguish between those commands which fall within the authority of the sovereign and those which do not. Such a declaration can be made in various ways, and, in order that it may have the effect proposed, it is only necessary that the bulk of the community should consider all commands issued in excess of the authority set forth invalid, and should not be disposed to obey them. It can be made, for example, by means of a convention or compact as Bentham suggests, or without any compact by the sovereign himself, by an assembly of citizens when changing the form of government, or by several independent communities when uniting to create a new nation. It is, in fact, conceivable that it might be made without any written instrument at all, by a process of gradual evolution, although such a state of things is not very likely to occur, and probably would not be permanent. Provided, however, the result I have described is reached, the method of attaining it is quite immaterial.

Several different theories about the political institutions of the United States have been put forward from time to time, but I shall refer to them only for the sake of suggesting the bearing which the foregoing discussion may have upon them. If Austin's doctrines concerning the nature of sovereignty and of law be accepted, only two views of the government of this country can be entertained. Of these, one has been rendered famous by the advocates of extreme States' rights, who considered the State completely sovereign, and maintained that without its own consent (a consent revocable, moreover, at any time), neither the State nor its citizens could be bound by any command of the central government. The other is the extreme national theory, which treats the authority of the States as entirely dependent upon the pleasure of the national sovereign; meaning, of course, by this term, not Congress, but the States in union, the American people, or whoever else the sovereign of the nation may be. Now, if the first of these views is adopted the Constitution must be looked upon as a

treaty revocable by any party thereto; if the second, it is a command issued by the national sovereign, which can be changed at will by him; but if, on the other hand, we reject Austin's theory, we are at liberty to consider the Constitution neither a treaty nor a command, nor even a law at all, but a declaration of the limitations of various sovereign powers, which cannot legally be changed except in the manner provided in the instrument itself. The recent discussion in Rhode Island, of the question whether the Constitution of a State can legally be amended, except in the manner prescribed therein, turns in part upon the same principles, because, if Austin's theory is sound, the Constitution is a law set by the sovereign, who is, in the case we are considering, the electoral body of the State; and it follows that this body must have power to revoke or alter its own commands. But, if Austin's theory is wrong, it is possible that there may exist in the State no legislative or sovereign power whatever, except such as is described in the Constitution, and, if so, neither the voters nor any other body of persons can have any legal authority to make changes in the government, except in accordance with the provisions of that instrument.

It may be worth while, in this connection, to remark that, whether, like Austin, we consider a constitution a law set by an absolute sovereign, or whether we regard it as a law made without the command of a political superior, or even as no law at all, but simply as a declaration of the existing limits of sovereign power, the effect of an unconstitutional statute is in each case the same, because, if the Constitution, whatever its origin, is a law of superior authority, every inferior law inconsistent with it must be void; and if, on the other hand, without being a law it is the measure of legislative power, a statute which exceeds the limits prescribed is destitute of legal authority, and is equally invalid. On this point, indeed, and in regard to the functions of courts in dealing with such laws, all these theories are exactly in accord.

In attacking the doctrines concerning sovereignty and law taught by the analytical jurists, I have in reality only been trying to carry out their own principles. Before their day it was customary to seek a foundation for sovereignty in some antecedent right to rule, such as a divine commission or an original compact, and the great change in the theory of government which Bentham and Austin introduced consisted in their assertion that sovereignty was not a question of right, but of fact; that the sovereign was not the person

who had a right to rule, but the person who did, in fact, receive obedience. Now, the argument in the foregoing pages is an attempt to extend this principle, and to show that the existence of any law is a question of fact. A command or rule of conduct, according to this view, becomes a law, not because it ought to be such, or because it proceeds from a person in other respects sovereign, but only in case it is really obeyed; and in the same way the extent of sovereign power being, like the very existence of sovereignty, a pure matter of fact, depends entirely upon the extent of the obedience actually rendered.

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